Supreme Court, U.S.
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No. 95-1805

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**RICHARD BUSCH, as Administrator of the Estate of MELISSA BUSCH, Deceased,**

*Petitioner,*

v.

**AMREP, INC.,**

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Illinois**

## BRIEF OF AMREP, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. RUBIN
JANE B. MCCULLOUGH*
ALTHEIMER & GRAY
10 South Wacker Drive
Suite 3600
Chicago, Illinois 60606
(312) 715-4000

*Counsel for Respondent*
**Counsel of Record*

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

29 pp

## QUESTION PRESENTED

Does the Federal Hazardous Substances Act ("FHSA") preempt a state common law cause of action that alleges a label is defective because it lacks additional warnings when the Consumer Product Safety Commission, the agency charged with administering the FHSA, has determined that the label "meets, and in certain respects exceeds" the labeling requirements in Section 1261(p) of the FHSA?

## PARTIES

The following were parties to the proceeding in the Illinois Supreme Court:

| | |
|---|---|
| Petitioner/Plaintiff | Richard Busch |
| Respondent/Defendant | AMREP, Inc. |
| Defendant | Graphic Color Corporation |

In accordance with this Court's Rule 29.6, AMREP, Inc. discloses that its parent company is Dawn Chemical, Inc. AMREP has no nonwholly owned subsidiaries.



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**On Petition for Writ of Certiorari to the Supreme Court of Illinois**

## BRIEF OF AMREP, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AMREP, Inc. ("AMREP") opposes the petition for certiorari to the Supreme Court of the State of Illinois filed by petitioner Richard Busch.

## OPINIONS AND JUDGMENTS BELOW

The Opinion of the Supreme Court of Illinois, dated February 15, 1996 is reported at 169 Ill.2d 325, 662 N.E.2d 397, *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 6, 1996) (No. 95-1805). The Opinion of the

Appellate Court of Illinois, Second District, dated January 5, 1995 is reported at 268 Ill.App.3d 763, 644 N.E.2d 839, *reh'g denied*, January 31, 1995, *petition for leave to appeal granted* 162 Ill.2d 564, 652 N.E.2d 339 (1995).[1] The Order of the Circuit Court of DuPage County, Illinois and a portion of that court's ruling on January 3, 1994, are included in petitioner's Appendix at A-42-44.

## STATUTES AND REGULATIONS INVOLVED

The Federal Hazardous Substances Act (the "FHSA"), 15 U.S.C. §1261(d), (f)(1)(A)-(B), (g), (n), (p), and §1261 Notes (b)(1)(A)-(B) (1976 U.S.C.C.A.N. 90 Stat. 503, 510-11); §1262(a)(1)-(2), and (g)(2). Consumer Product Safety Commission, Part 1031—Commission Participation And Commission Employee Involvement In Voluntary Standards Activities, 16 CFR §1031 (1995). AMREP's Appendix contains the relevant provisions not found in petitioner's Appendix.[2]

## STATEMENT OF THE CASE

### A. Course of Proceedings and Dispositions Below

On September 14, 1987, the Consumer Product Safety Commission (the "CPSC"), the agency charged with administering the FHSA, published its determination

[1] Petitioner's Appendix includes the Illinois Supreme Court's slip opinion at A-1 and the Product Liability Reporter publication of the Appellate Court's opinion at A-29. For the Court's convenience, AMREP will cite to the opinions found in petitioner's Appendix.

[2] AMREP will cite to petitioner's Appendix as "Pet.App." and to its own Appendix as "Resp.App."



that household products containing methylene chloride are hazardous substances and it issued notice of its enforcement policy ordering that these products bear labeling that meets the requirements of Section 1261(p) of the FHSA. Notices Consumer Product Safety Commission Labeling Of Certain Household Products Containing Methylene Chloride; Statement Of Interpretation And Enforcement Policy, 52 Fed.Reg. 34698-703 (1987) (Pet. App. at A-50). In addition, the CPSC determined that the labeling language for methylene chloride paint strippers recommended by a group of industry and consumer interest representatives working with the CPSC's staff "meets, and in certain respects exceeds, the minimum requirements of section 2(p)(1) of the FHSA". *Id.* The CPSC's enforcement policy began requiring this label in 1988. *Id.*

Respondent AMREP is the manufacturer of Misty Paint Stripper and Decal Remover ("Misty"), a paint stripper containing methylene chloride. On March 20, 1989, petitioner's wife, Melissa Busch, allegedly died as a result of "methylene chloride intoxication" (R. C-345).[3] Petitioner's Amended Complaint alleges a common law failure to warn cause of action against AMREP based entirely on alleged defects in Misty's label (R. C-11-13). It is undisputed that Misty's label contains the requisite language that the CPSC determined satisfies the requirements of Section 1261(p)(1) of the FHSA and which the CPSC announced it will enforce against manufacturers such as AMREP (Petition at 7; R. C-461-62; R. C-328-30).

[3] Citations to the trial court record are referenced as "R.C.-__".

AMREP filed a motion for summary judgment on the grounds that the FHSA preempts petitioner's cause of action. In response, petitioner expressly admitted the preemptiveness of both the FHSA and the CPSC's 1987 Statement of Interpretation and Enforcement Policy, but he argued that because the CPSC's recommended label was only designed to warn of the risk of cancer, his cause of action for failure to warn of a different risk was not preempted (R. C-288; C-294; C-300-31; C-333-69; C-372-431; C-433-52; C-453-514; C-533-34). Thus, in the trial court, petitioner wrote:

> Admittedly the Consumer Product Safety Commission has identified methylene chloride as a hazardous substance and has prescribed a certain warning for it. The notice requiring this label is cited in Defendant's motion . . . .
>
> * * *
>
> Under the F.H.S.A. the only preemption provided for is where the Consumer Product Safety Commission has identified a particular hazard and has provided a warning for that hazard. *When this occurs the states are preempted only from regulating warnings concerning the particular hazard identified by the Consumer Products Safety Commission.*

(R. C-384, C-389, emphasis added). Similarly, petitioner argued to the trial court,

> ***[T]he rule that [the CPSC] issued or the intention of enforcement that they issued *** indicates such products may pose a carcinogenic risk to humans. That was the only risk of injury they were concerned with, and it's the only risk of injury that label was issued under. Because of that, that's the only risk that's preempted. *** this is the real position of the defense in this case.



(R. C-533-34). In short, the only question petitioner raised in the trial court was whether or not the CPSC label on AMREP's product was designed to warn of the risk of inhalation toxicity. The trial court rejected petitioner's contention that it was not and held that the FHSA preempts plaintiff's common law failure to warn cause of action against AMREP (Pet.App. at A-42-44).

On appeal to the Illinois Appellate Court, petitioner contended for the first time that the FHSA does not preempt his cause of action because the CPSC failed to follow proper FHSA rule-making procedures when it identified methylene chloride as a hazardous substance and mandated cautionary labeling for methylene chloride paint strippers (Pet.App. at A-31). Alternatively, petitioner repeated his trial court defense that the FHSA does not preempt his cause of action because the CPSC label was not designed to warn of the risk of inhalation toxicity (Pet.App. at A-31). Thus, although petitioner admitted in the trial court that AMREP's compliance with the FHSA by adopting the CPSC label would preempt a cause of action for failure to warn of the risk of cancer, he reversed himself on appeal and argued that AMREP's use of the CPSC label would not trigger the FHSA's preemption of any failure to warn cause of action.

The Illinois Appellate Court unanimously rejected petitioner's attempt to re-invent his case on appeal and affirmed the trial court. In an opinion by Presiding Justice McLaren, the Appellate Court held that the petitioner waived for appeal the questions of whether the CPSC properly declared methylene chloride a hazardous substance and properly promulgated a label for methylene chloride paint strippers because petitioner failed to preserve these issues in the trial court (Pet.App. at 32-34). In addition, the Appellate Court held that

> there is no question that [Misty's label] tracks the language which the Safety Commission has determined to be an adequate warning for the exact danger experienced by Melissa Busch. As the Safety Commission's rules are, as we noted above, facially valid, they preempt State regulation in the area of warning labels for the danger of acute inhalation poisoning from methylene chloride.

(Pet.App. at 38).

On appeal to the Illinois Supreme Court, petitioner's opening brief only argued that the Appellate Court erred when it held that the FHSA preempts his cause of action. Significantly, petitioner did not argue that the Appellate Court erred when it found he had waived on appeal the issue of whether AMREP's use of the CPSC label lacks preemptive effect because the label was improperly promulgated. AMREP, on the other hand, argued that the Appellate Court's decision should be affirmed for two reasons. First, petitioner had waived the issue of whether AMREP's use of the CPSC-mandated label could trigger FHSA preemption because he failed to preserve this issue in the trial court and because he had waived the issue of whether the Appellate Court's finding of waiver was error by failing to make that argument in his opening brief.[4] Second, the Appellate Court properly determined that the FHSA preempts petitioner's cause of action because petitioner seeks to impose labeling language that differs from the language the CPSC determined "meets, and in certain respect exceeds" the labeling requirements of Section 1261(p) of the FHSA.

[4] Illinois Supreme Court Rule 341(e)(7) expressly provides that "[p]oints not argued" in an appellant's brief "shall not be raised in the reply brief, in oral argument, or on petition for rehearing". 134 Ill.2d R. 341(e)(7) (1990).



In a unanimous and well-reasoned opinion by Chief Justice Bilandic, the Illinois Supreme Court affirmed the Appellate Court's finding that the FHSA preempts petitioner's cause of action. Specifically, the Illinois Supreme Court held:

- "Congress intended to preempt all nonidentical State laws proposing cautionary labeling requirements addressing the same risk of illness or injury as the FHSA" (Pet.App. at A-10);
- The provisions of Section 1261(p) of the FHSA are "requirements for the cautionary labeling of hazardous substances . . . . Indeed, Congress made this fact clear by referring to the provisions of section 1261(p) as cautionary labeling 'requirements' in the language of the FHSA's preemption provision" (Pet.App. at A-15);
- The CPSC's detailed labeling for methylene chloride paint strippers represents the CPSC's interpretation of the statute it is charged with administering and it is proper to defer to the CPSC's conclusion that this label satisfies the cautionary labeling requirements of Section 1261(p) of the FHSA because Congress has yet to express its view on the issue and because the CPSC's interpretation of the FHSA is reasonable (Pet.App. at A-17-18);[5]

[5] Like the Illinois Supreme Court, this Court has repeatedly held that, under the "Chevron doctrine", when an agency is entrusted with the responsibility to administer legislation, its interpretation of the meaning of that legislation is entitled to substantial deference by the courts. *E.g.*, *Babbitt v. Sweet*

(continued...)

- Misty's label is "virtually identical" to the CPSC label for methylene chloride paint strippers. Therefore, the additional warnings petitioner seeks to impose under Illinois common law constitute requirements that are not identical to those required under the FHSA (Pet.App. at A-18); and
- "[T]he cautionary labeling requirements of the FHSA for paint strippers containing methylene chloride are intended to protect against the same risk at issue here, namely, the risk of acute inhalation toxicity" (Pet.App. at A-20).

The Illinois Supreme Court did not, however, decide the state law questions of waiver. It neither affirmed nor reversed the Appellate Court's finding of waiver, nor did it resolve the question of whether petitioner waived his right to challenge that Appellate Court finding when he failed to argue it was error in his opening brief (Pet. App. at A-1-28).

### B. Corrections of Misstatements in the Petition for Certiorari

Pursuant to United States Supreme Court Rule 15.2, AMREP brings to the Court's attention the following misstatements of law contained in the petition for certiorari:

1. First, the petition erroneously states that in order for the CPSC to declare a product hazardous, the CPSC must issue a regulation pursuant to Section 1262(a)(2) of the FHSA, which incorporates the regulatory scheme in the Food Drug and Cosmetic Act (Petition at 10). This is a misstatement of the law. Under Sections 1261(f)(1)(A)-(B) and 1262(a)(1) of the FHSA, a substance can be determined to be hazardous without a regulation declaring it hazardous.[6] Section 1262(a)(2) only applies if the CPSC elects to proceed by regulation to declare a substance hazardous.

2. Second, the petition erroneously states that in order for the CPSC to properly promulgate a specific label for a product, the CPSC must issue a regulation pursuant to

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[5] (...continued)
*Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407, 2416 and 2418 (1995); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). In *Sweet Home*, this Court recently and firmly emphasized the Chevron doctrine when it deferred to the interpretation of a statute by an agency which had been "delegated broad administrative and interpretive power." 115 S.Ct. at 2418.

[6] As a court recently interpreted Section 1262(a):

> [T]he language of section 1262(a), which gives the Commission discretionary power to promulgate regulations to avoid uncertainty, was tracked in section 3 of the original act. *** With regard to [current section 1262(a)], the House Report states: 'The failure to issue such a declaratory regulation will, of course, not have the effect of excluding from the basic definition of the term "hazardous substance" any substance otherwise within it.'

*X-TRA Art, Inc. v. Consumer Product Safety Comm'n*, 1991 U.S. Dist. LEXIS 8290 (N.D.Cal. June 11, 1991). Likewise, the CPSC interprets Section 1262(a)(1) to allow that agency to declare a substance hazardous without enacting a regulation. Procedures For Formal Evidentiary Public Hearing, 55 Fed.Reg. 48628 (1990) ("For a substance to be considered a hazardous substance under [15 U.S.C. §1262(a)(1)] it is not necessary for the [CPSC] to act by regulation to declare it a hazardous substance").

Section 1262(a)(2) of the FHSA, which incorporates the regulatory scheme in the Food Drug and Cosmetic Act (Petition at 10 and 15). This too is a misstatement of law. In 1981, Congress amended the FHSA to expressly require the CPSC to rely on voluntary labeling standards rather than promulgating mandatory labeling standards when a voluntary standard will eliminate or adequately reduce the risk of injury and it is likely there will be substantial compliance with the voluntary labeling standard. 15 U.S.C. §1262(g)(2) (Resp.App. at 2a-3a). Indeed, Section 1262(g)(2) expressly states that the CPSC can terminate any proceeding to declare a substance a "banned hazardous substance" and can elect instead to rely on a voluntary labeling standard (Resp.App. at 2a-3a). As the result of Congress' inclusion of Section 1262(g)(2) in the FHSA, the CPSC enacted specific regulations establishing guidelines under which that agency is required to rely on voluntary standards, such as the label at issue in this case. Commission Participation And Commission Employee Involvement In Voluntary Standards Activities, 16 CFR §1031 (1995) (Resp.App. at 3a-4a).[7] Thus,

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[7] The CPSC's regulations provide in part that:

> The [CPSC] may find that a mandatory standard is not necessary where compliance with an existing voluntary standard would eliminate or adequately reduce the risk of injury associated with the product, contains requirements and test methods that have been evaluated and found acceptable by the [CPSC], and it is likely that there will be substantial and timely compliance with the voluntary standard. Under such circumstances, the [CPSC] may agree to encourage industry compliance with the voluntary standard and subsequently evaluate the effectiveness of the

(continued...)



petitioner's citation to *Pactra Industries, Inc. v. Consumer Product Safety Comm'n*, 555 F.2d 677 (9th Cir. 1977) and *Springs Mills, Inc. v. Consumer Product Safety Comm'n*, 434 F. Supp. 416 (D.S.C. 1977) (Petition at 11), as support for his contention also misstates the law because these cases were decided before Section 1262(g)(2), requiring the CPSC to rely on voluntary labeling standards, was added to the FHSA.

3. Third, the petition erroneously states that in order for the FHSA to preempt state law, the CPSC must enact a regulation (Petition at 10). Petitioner misstates the law because the FHSA contains two preemption provisions. The first provision, the "labeling" preemption provision that petitioner admits applies in this case, does not require a regulation, but instead provides for preemption by a "cautionary labeling requirement under section [1261](p)" of the FHSA. 15 U.S.C. §1261 note (b)(1)(A) (Petition at 6; Pet.App. at A-47). Only the second FHSA preemption provision, the "banned hazardous substances" provision that is not at issue here, provides for preemption by a "requirement" promulgated "under regulations". 15 U.S.C. §1261 note (b)(1)(B) (Resp.App. at 1a-2a). Thus, when Congress meant that only a regulation could preempt, it drafted a preemption provision that uses the word "regulation", but when it meant that something other than a "regulation" could preempt, Congress drafted the "labeling" preemption provision at issue here that does not use the word "regu-

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[7] (...continued)

> standard in terms of accident and injury reduction for products produced in compliance with the standard.

16 CFR §1031.4(a)(2) (Resp.App. at 3a-4a).

lation". Accordingly, petitioner's citation to *Toy Mfrs. of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1993), as support for his position also misstates the law because that decision interprets and applies the "banned hazardous substances" preemption provision (note (b)(1)(B)), which petitioner concedes does not apply in this case.

4. Finally, the petition misstates that the Illinois Supreme Court held that the CPSC label for methylene chloride paint strippers is a federal law that preempts petitioner's cause of action (Petition at 9-10). In truth, the Illinois Supreme Court held that Section 1261(p) of the FHSA is the federal law that preempts petitioner's cause of action (Pet.App. at A-15). According to the Illinois Supreme Court, the CPSC label on AMREP's product is "an interpretation" of the FHSA by the agency charged with administering the Act that this particular label "satisfies the cautionary labeling requirements of Section 1261(p)(1)" (Pet.App. at A-17-18).

## REASONS FOR DENYING THE WRIT

Petitioner argues that his writ should be granted for these reasons: (a) the Illinois Supreme Court wrongly determined that the FHSA preempts his cause of action; (b) the Illinois Supreme Court's decision conflicts with the Ohio Supreme Court's decision in *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994); and (c) the Illinois Supreme Court's decision conflicts with this Court's holdings in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995), and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (Petition at 6-15). All of petitioner's arguments rest entirely on his self-serving misreading of these authorities and, for the reasons below, petitioner's writ should be denied.



### A. The Illinois Supreme Court Properly Held That The FHSA Preempts Petitioner's Cause Of Action Because Petitioner Seeks To Impose Labeling Requirements That Are Not Identical To The FHSA's Labeling Requirements For Methylene Chloride Paint Strippers.

Petitioner's contention that the Illinois Supreme Court misapplied the FHSA is based on petitioner's false assertion that the labeling requirements in Section 1261(p) of the FHSA are insufficient to preempt his cause of action because they are identical to the labeling he seeks to impose under Illinois law (Petition at 9). Petitioner's argument conveniently ignores the fact that the CPSC has determined that the label on AMREP's product "meets, and in certain respects exceeds, the minimum requirements" of Section 1261(p)(1) of the FHSA (Pet. App. at A-53-54). Thus, the Illinois Supreme Court correctly held that:

> The labeling requirements which the plaintiff seeks to impose on AMREP, namely, a warning that inhalation of Misty Paint Stripper 'would cause death' and 'adequate instructions for its use' (implying that the existing instructions are not adequate), constitute requirements that are not 'identical' to those required under section 1261(p)(1). (See 15 U.S.C. s 1261 note (b)(1)(A) 1988). As the Safety Commission's interpretation of section 1261(p)(1) reveals, the additional information which the plaintiff seeks to require AMREP to place on the label is not mandated by the FHSA. Accordingly, the plaintiff's tort claims

> against AMREP, based on a failure to warn, are preempted.

(Pet.App. at A-18). In short, the Illinois Supreme Court's purported "misapplication" of the FHSA is simply a product of petitioner's invention. Moreover, as this Court's own Rule 10 provides, misapplication of a properly stated rule of law is not a basis for granting a writ of certiorari except in rare instances. The Illinois Supreme Court's decision does not meet this prerequisite as evidenced by this Court's previous refusal to review a similar decision in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir.) *cert. denied*, 113 S.Ct. 2999 (1993) (the FHSA preempts state tort claims that seek to impose labeling requirements that are different from the labeling the FHSA requires).[8]

**B. There Is No Conflict Between The Illinois Supreme Court's Decision And The Ohio Supreme Court's Decision In *Jenkins v. James B. Day & Co.***

Contrary to petitioner's assertion, there is no conflict between the Illinois Supreme Court's decision and the Ohio Supreme Court's decision in *Jenkins v. James B. Day & Co.*, 69 Ohio St.3d 541, 634 N.E.2d 998 (1994), because these courts decided the question of FHSA preemption based upon diametrically opposed facts. In *Jenkins*, the Ohio Supreme Court—like the Illinois Supreme Court—was asked to determine whether the FHSA labeling requirements in Section 1261(p) preempt a state law failure to warn claim that alleges labeling

[8] Like the Fourth Circuit, the Fifth Circuit Court of Appeals also has held that the FHSA preempts state law warning requirements, other than those imposed by the FHSA. *Comeaux v. Nat'l Tea Co.*, 81 F.3d 42 (5th Cir. 1996).



defects in the packaging of a methylene chloride paint stripper. *Id.* But the defendant manufacturer in *Jenkins*—unlike AMREP in this case—did not argue and did not introduce evidence that its label is identical to the label the CPSC has determined satisfies the labeling requirements in Section 1261(p). *Id.* Thus, the facts before the *Jenkins* court were so decidedly different from the facts before the Illinois Supreme Court that comparing the legal holdings in these cases is the quintessential comparison of apples and oranges. Indeed, the Ohio court expressly stated that it would have found there was preemption if the defendant in that case had introduced the evidence of FHSA compliance that AMREP introduced in this case. As the *Jenkins* opinion states:

> To the extent that appellee attempts to impose a responsibility on appellant to label Marine-Strip in a more elaborate or different manner than that imposed by the FHSA, we must agree with the *Moss* court that appellee's claim is preempted. *** The court of appeals held that appellee's claims based on labeling were not preempted even if appellant complied with the FHSA. This was error.

69 Ohio St.3d at 547 n.2, 634 N.E.2d at 1003 n.2.

> Although a claim based on a state law standard identical to the labeling requirement of the FHSA is not preempted, summary judgment would still be proper if evidence showed that the label did comply with the FHSA.

69 Ohio St.3d at 549, 634 N.E.2d at 1004. Clearly, there is no conflict between the Illinois Supreme Court's opinion and a decision that states the Ohio court would reach the same holding if it was deciding the same facts.

### C. There Is No Conflict Between The Illinois Supreme Court's Decision And This Court's Decisions In *Freightliner Corp. v. Myrick* And *CSX Transportation, Inc. v. Easterwood*.

In both *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995) and *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court found there was no preemption because the agency promulgation necessary to effect preemption did not exist. This court's interpretations and applications of other statutes with distinctly different preemption provisions do not conflict with the Illinois Supreme Court's determination that under the FHSA, Section 1261(p) of the act itself is sufficient to cause preemption.

In *Freightliner*, this Court held that a judicially suspended safety standard did not expressly preempt plaintiff's cause of action under the National Traffic and Motor Vehicle Safety Act of 1966 ("Safety Act") because that statute's preemption provision only applies " '[w]henever a Federal motor vehicle safety standard . . . is in effect' with respect to the 'same aspect of performance' regulated by a state standard." 115 S.Ct. at 1487. This Court also found there was no implied preemption because it was possible for plaintiff to comply with both the Safety Act and state law. *Id.*

Petitioner argues there is a conflict between the *Freightliner* decision and the Illinois Supreme Court's decision because the voluntary labeling standard the CPSC adopted pursuant to Section 1262(g)(2) of the FHSA can have no greater preemptive effect than the judicially suspended standard in *Freightliner* (Petition at 15). Petitioner's contention overlooks the important differences between these two statutes: the Safety Act's



preemption provision requires that its administering agency promulgate a "standard" that "is in effect"; the FHSA's preemption provision provides that the labeling requirements in Section 1261 of the act itself are sufficient to cause preemption. Thus, the absence of a "standard" under the Safety Act cannot reasonably be equated to the absence of a regulation under the FHSA.

Similarly in *CSX*, this Court decided the preemption issue in the context of a statute that—like the Safety Act in *Freightliner*—expressly provides that preemption occurs only when "a rule, regulation, order, or standard covering the subject matter of such State requirement" has been adopted. 507 U.S. at 662 fn 2. Based upon its determination that no "regulation" had been issued "covering" the same subject matter, this Court found that the Federal Railroad Safety Act ("FRSA") did not preempt plaintiff's negligence claim. 507 U.S. at 668. Again, petitioner's attempt to invent a conflict between the Illinois Supreme Court's finding of preemption under the FHSA and this Court's determination that there was no preemption under the FRSA falls flat. In order to reach petitioner's supposed conflict, it is necessary to completely disregard the fact that the FRSA's preemption provision requires the promulgation of a rule or regulation, while the FHSA's preemption provision does not.

### D. The Existence Of An Unresolved State Law Basis For Affirming The Illinois Supreme Court's Decision Is A Compelling Reason Not To Grant Petitioner's Writ.

Finally, although petitioner neglects to advise this Court, there is an independent state law ground, *i.e.*,

waiver, on which the Illinois Supreme Court's decision to affirm the Appellate Court could be upheld. Thus, the effect of this Court's reversal of the Illinois Supreme Court's decision on the federal question petitioner raises would be to remand this case to the Illinois Supreme Court to allow that court to decide the independent non-federal question of whether petitioner waived the federal question this Court decided. 12 J. Moore, H. Bendix, B. Ringle, Moore's Federal Practice ¶511.01 (2d ed. 1995). Clearly, the existence of this independent state law basis for the Illinois Supreme Court's decision is a compelling reason not to grant petitioner's writ.

## CONCLUSION

The Illinois Supreme Court did not misapply the Federal Hazardous Substances Act. Nor does its opinion conflict with the decision in *Jenkins v. James B. Day & Co.*, *CSX Transportation, Inc. v. Easterwood*, or *Freightliner Corp. v. Myrick*. Petitioner's efforts to create false conflicts merely evidences the weakness of his petition and underscores the obvious conclusion that the Illinois Supreme Court's opinion does not merit this Court's review.

Respectfully submitted,

ROBERT J. RUBIN
JANE B. MCCULLOUGH*
ALTHEIMER & GRAY
10 South Wacker Drive
Suite 3600
Chicago, Illinois 60606
(312) 715-4000

*Counsel for Respondent*
**Counsel of Record*



## RESPONDENT'S APPENDIX

### The Federal Hazardous Substances Act

### (15 U.S.C. Section 1261 *et seq.*)

**§1261. Definitions**

For the purposes of this chapter—

**(g)** The term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

**(n)** The term "label" means a display of written, printed, or graphic matter upon which the immediate container of any substance or, in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly upon the article involved or upon a tag or other suitable material affixed thereto; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise.

**Note (b)(1)(B) Effect upon Federal and State law**

**(B)** Except as provided in paragraphs (2), (3) and (4), if under regulations of the Commission promulgated under or for the enforcement of section 2(q) [15 USCS §1261(q)] a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish

or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations.

**§1262 Declaration of hazardous substances**

**Publication of submitted standard as proposed regulation**

**(g)(1)** If the Commission determines that any standard submitted to it in response to an invitation in a notice published under subsection (f)(5) of this section if promulgated (in whole, in part, or in combination with any other standard submitted to the Commission or any part of such a standard) as a regulation under section 2(q)(1) [15 USCS §1261(q)(1)] of this title or subsection (e) of this section, as the case may be, would eliminate or adequately reduce the risk of injury identified in the notice provided under subsection (f)(1), the Commission may publish such standard, in whole, in part, or in such combination and with nonmaterial modifications, as a proposed regulation under such section or subsection.

(2) If the Commission determines—

(A) compliance with any standard submitted to it in response to an invitation in a notice published under subsection (f)(6) is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and

(B) it is likely that there will be substantial compliance with such standard,

the Commission shall terminate any proceeding to promulgate a regulation under section 1261(q)(1) [15 USCS §1261(q)(1)] or subsection (e) of this section, respecting such risk of injury and shall publish in the Federal Register a notice which includes the determination of the Commission and which notifies the public that the Commission will rely on the voluntary standard to eliminate or reduce the risk of injury.



**Consumer Product Safety Commission—**
**Commission Participation And**
**Commission Employee Involvement In**
**Voluntary Standards Activities**

**(16 CFR §1031)**

**§1031.2 Background.**

**(b)** In 1981, the Congress amended the Consumer Product Safety Act, The Federal Hazardous Substances Act, and the Flammable Fabrics Act, to require the Commission to rely on voluntary standards rather than promulgate a mandatory standard when voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with the voluntary standards. (15 U.S.C. 2056(b), 15 U.S.C. 1262(g)(2), 15 U.S.C. 1193(h)(2)).

**§1031.4 Effect of voluntary standards activities on Commission activities.**

**(a)(1)** The Commission, in determining whether to begin proceedings to develop mandatory standards under the acts it administers, considers whether mandatory regulation is necessary or whether there is an existing voluntary standard that adequately addresses the problem and the extent to which that voluntary standard is complied with by the affected industry.

**(2)** The Commission acknowledges that there are situations in which adequate voluntary standards, in combination with appropriate certification programs, may be appropriate to support a conclusion that a mandatory standard is not necessary. The Commission may find that a mandatory standard is not necessary where

compliance with an existing voluntary standard would eliminate or adequately reduce the risk of injury associated with the product, contains requirements and test methods that have been evaluated and found acceptable by the Commission, and it is likely that there will be substantial and timely compliance with the voluntary standard. Under such circumstances, the Commission may agree to encourage industry compliance with the voluntary standard and subsequently evaluate the effectiveness of the standard in terms of accident and injury reduction for products produced in compliance with the standard.

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